Petition

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81-2092

No.

Supreme Court of the United States

October Term, 1981

HANNA BONKOWSKY,
Petitioner,

vs.

OTTO BONKOWSKY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

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QUESTIONS PRESENTED

I. Is Ohio's Doctrine of Interspousal Tort Immunity Unconstitutional and in violation of the Fourteenth Amendment to the United States Constitution in that it deprives spouses of equal protection under the law without an appropriate governmental interest being suitably furthered by the unequal treatment?

II. Is Ohio's doctrine of Interspousal Tort Immunity Unconstitutional and in violation of the Fourteenth Amendment to the United States Constitution in that it creates an irrebuttable presumption that denies due process of law to spouses?

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OPINIONS BELOW

The Trial Court granted defendant's Motion for Summary Judgment and entered judgment thereon which was journalized March 24, 1980. The judgment is reproduced in the Appendix *infra*, page 32.

The decision and opinion of the Court of Appeals of Ohio was unreported, but is reproduced in the Appendix *infra*, page 24.

The Opinion and Judgment of the Supreme Court of Ohio is reported at 69 Ohio St. 2d 152 (February 10, 1982) and is reproduced in the Appendix *infra*, pages 7 and 33.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

CONSTITUTION AND STATUTES

1. Constitution of the United States, Amendment 14, §1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Ohio Constitution, Art. 1, §16.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

3. Ohio Constitution, Art. 1, §2.

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked or repealed by the general assembly.

4. Ohio Revised Code, Ann. §2307.09.

A married woman may sue and be sued as if she were unmarried, and her husband may be joined with her only when the cause of action is in favor of or against both.

5. Ohio Revised Code, Ann. §2323.09.

When a married woman sues or is sued, proceedings shall be had and judgement shall be rendered and enforced as if she were unmarried. Her property and estate is liable for a judgement against her, but is entitled to the benefits of all applicable exemptions provided by statute.

STATEMENT OF THE CASE

The doctrine of interspousal immunity with its inherent differential treatment of spouses and non-spouses violates the equal protection clause of the Fourteenth Amendment of the U.S. Constitution without reasonably advancing or furthering a legitimate state interest. The state interest of promoting marital harmony was advanced by the Ohio Supreme Court as the basis for disallowing a negligence action between spouses in the State of Ohio.

The argument that perpetuation of the doctrine of interspousal immunity will promote marital harmony is specious, unfounded and has been rejected by the majority of other jurisdictions in the United States of America.

The action was originally commenced by Hanna Bonkowsky against her husband Otto Bonkowsky. The case involved serious and permanent injuries and damages sustained by Hanna as a result of Otto's negligence in operating the automobile his wife occupied. The trial court dismissed the action on the basis of the doctrine of interspousal tort immunity which denies an injured spouse from asserting a negligence claim against his or her negligent spouse.

The Court of Appeals, Eighth Judicial District and the Ohio Supreme Court affirmed the trial court's ruling

and upheld the doctrine. Yet in both opinions of the reviewing courts concurring and dissenting opinions carefully and repeatedly announced that serious constitutional issues had been raised by the majority's ruling. The dissenting opinions of the Ohio Supreme Court criticized this doctrine which denies a wife or husband a cause of action solely on the basis of their marital status. This constitutional issue was first advanced at the trial court and again in the Court of Appeals and the Supreme Court of Ohio.

REASON FOR GRANTING THE WRIT

I. Ohio's Doctrine of Interspousal Tort Immunity is Unconstitutional and in violation of the Fourteenth Amendment to the United States Constitution in that it deprives spouses of equal protection under the law without an appropriate governmental interest being suitably furthered by the unequal treatment.

A married woman (or man) is a person and an individual and she/he is is entitled to the same protection of the law as other individuals regardless of ancient and outdated statements of the common law. This case brings to light fundamental rights involved in family relationships. The common law policy of the State of Ohio denies a class of people relief because of the existence of the marital relationship and consequently it infringes upon fundamental rights of family members.

In *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968) the Court suggested that a classification based on marital status might be unconstitutional. Also, the Court in *Eisenstadt v. Baird*, 405 U.S. 438 (1972) held a Massachusetts statute that made criminal the giving of contraceptives to unmarried people unconstitutional.

This dissimilar treatment granted married people vis-a-vis unmarried persons was held to violate the Equal Protection Clause.

Marriage and marital harmony are deserving of special recognition and protection. However, it is obvious that no court of law in Ohio or any other jurisdiction can promote or preserve harmony. Harmony either exists or it doesn't. Divorce is commonplace in our society (and in Ohio) notwithstanding judicial constraint on interspousal actions. The major factor spurring most marriage failures is economics. If Ohio wishes to advance its state's policy of harmony it can best increase the likelihood of same by allowing the economic strain placed on the family budget as a result of personal injury actions to be transferred to a liability insurance carrier who can best incur same.

Both the promotion of marital harmony and the prevention of fraud on insurance companies can be attained in a less intrusive manner than interspousal immunity. The doctrine is clearly overinclusive because it prohibits spouses who would not divorce or commit fraud from bringing an action against the other spouse.

This infringement violates the equal protection clause of the United States Constitution because there exists no legitimate compelling state interest and/or there are obviously narrower means to achieve that interest. *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

II. Ohio's Doctrine of Interspousal Tort Immunity is Unconstitutional and in violation of the Fourteenth Amendment to the United States Constitution in that it creates an irrebuttable presumption that denies due process of law to spouses.

This doctrine further raises due process issues as well. By affirming the Court of Appeals of Ohio, the highest Court in the State of Ohio has totally denied any spouse the right to be heard in a negligence action against his or her spouse.

This denial creates an irrebuttable presumption that the spouse and his or her mate will perpetrate a fraud on the Court and/or that the marriage will fail if the action is allowed. This shutting of the Courts is an irrebuttable presumption and as such denies due course of law to a spouse who wishes to sue for injuries caused by his or her spouse's negligence. See *Vlandis v. Kline*, 412 U.S. 441 (1973); *Jimenez v. Weinberger*, 417 U.S. 628 (1974).

CONCLUSION

The Supreme Court of Ohio has deprived Petitioner of equal protection of the law and due process of law under the Fourteenth Amendment of the United States Constitution. Petitioner urges this Court to grant this petition for a Writ of Certiorari to review the decision of the Ohio Supreme Court in this case.

Respectfully submitted,

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Appendix

APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided February 10, 1982)

No. 81-270

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

HANNA BONKOWSKY,
Appellant,

vs.

OTTO BONKOWSKY,
Appellee.

APPEAL From the Court of Appeals
for Cuyahoga County

This matter brings into issue the viability of Ohio's existing principle of interspousal tort immunity. The facts giving rise to this question are not controverted. Appellant, Hanna L. Bonkowsky, and appellee, Otto R. Bonkowsky, are wife and husband, respectively. While on an automobile trip in the state of Vermont, appellee was driving and appellant was a passenger in the car when an accident occurred, and appellant was injured. Appellant filed an action in the Court of Common Pleas of Cuyahoga County against appellee, claiming negligence on the part of the latter. The parties stipulated to the existence of automobile liability insurance, and that the policy did not expressly bar such an action. The appellee moved for summary judgment, contending that interspousal

immunity barred the claim despite the fact that the law of the state of Vermont would allow such an action. The Court of Common Pleas granted such motion, and the Court of Appeals affirmed upon the basis of Ohio's previously pronounced position on interspousal immunity.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Messrs. Weisman, Goldberg & Weisman, Mr. Fred Weisman and *Mr. Howard W. Mishkind,* for appellant.

Messrs. Kitchen, Messner & Deery and *Mr. Charles W. Kitchen,* for appellee.

Per Curiam. Appellant raises the previously reviewed issues that interspousal immunity policy discriminates against spouses without a valid or rational purpose, and deprives them of equal protection of the law under Section 2, Article I of the Ohio Constitution and under the Fourteenth Amendment to the United States Constitution. The additional argument raised by appellant is that such policy should not be followed in this state where there is shown to be liability insurance present under which policy the spouse's claims may be satisfied.

The policy in Ohio relative to the principle of interspousal immunity has most recently been reaffirmed in *Varholla v. Varholla* (1978), 56 Ohio St. 2d 269, wherein the majority of this court (Justice William B. Brown, dissenting), at pages 269-270, stated:

"The same issue was before this court in *Lyons v. Lyons* (1965), 2 Ohio St. 2d 243, where we held that such actions were barred by interspousal immunity. Our reasons were threefold: (1) the immunity promotes marital harmony by discouraging otherwise litigious spouses from pursuing real or fanciful claims to the detriment of the family unit; (2) the immunity prevents fraud and

collusion at the expense of tactically disadvantaged insurance companies; and (3) as this involves a matter of public policy, changes in this area must emanate from the General Assembly, not the courts."

Relative to the argument that the constitutionality of this principle should be viewed in the same manner as this court had determined the unconstitutionality of R. C. 4515.02, the guest statute in Ohio, this court stated at page 270, in the opinion:

"We think it sufficient to state that the interspousal immunity doctrine, with its inherent differential treatment of spouses and non-spouses, reasonably relates to the legitimate state interest of fostering marital harmony and preventing fraud and collusion. The difference between this doctrine and R. C. 4515.02 lies in the higher state concern for regulating marriage and the greater potential for fraud stemming from the marital relationship, where an insured defendant spouse stands to benefit personally from losing a lawsuit instituted by his spouse. * * *"

Appellant argues here, as appellant did in *Varholla*, that the reasons supportive of the basic principle of interspousal tort immunity are no longer viable in Ohio. Answering, this court, in *Varholla*, held that appellant's contention could not be accepted "in disregard of clear precedent."

We are in agreement with the thought that legal precedent should not be a straitjacket to an appropriate change of the legal policies of this state, especially where those policies are estabilshed by the common law pronouncements of this court. However, where this court has recently reviewed and spoken upon the viability of such policies, precedent of such pronouncements should be given a great deal of weight.

This is the stance of the issues raised herein challenging the doctrine of interspousal immunity. Having recently considered these policies in *Varholla,* and since nothing of import affecting that holding has subsequently taken place—other than the relatively short passage of time—we shall adhere to our previously pronounced position.

Additionally, we feel it necessary to point out that the fact that an insurance policy was in existence here is not a distinguishing factor in this case, as compared with *Lyons* or *Varholla, supra.* As previously noted, this court, in *Varholla,* discussed the interspousal immunity doctrine specifically in the context of an insured defendant spouse. In like manner, in *Lyons,* the court made specific reference to the involvement of insurance where, at page 245, it was stated: "There is the real danger of fraud or collusion between the spouses in such suits against each other, where insurance is involved."

Based on the foregoing, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

CELEBREZZE, *C.J.*, LOCHER, HOLMES and KRUPANSKY, *JJ.*, concur.

W. BROWN, SWEENEY and C. BROWN, *JJ.*, dissent.

LOCHER, *J.*, concurring. In order to analyze the controversy surrounding the doctrine of interspousal immunity, one need only consider one simple question: is the doctrine viable in today's society? I agree with the opinion of the court that the doctrine *is* viable. To hold otherwise would violate the integrity of the family. I also concur in the judgment and reasoning in that opinion, but I wish to expand on one point.

During the past quarter century, or so, this country has endured numerous threats to the integrity of her fundamental institutions. Critics of the doctrine of interspousal immunity have been at the vanguard of an unrelenting assault upon the family as an institution. The family is rebounding, however.

Critics of the doctrine focus almost exclusively on compensation for injuries. Their argument presumes that insurance will satisfy all needs. Yet, they never explain why suits between uninsured spouses are beneficial. Likewise, they ignore the capacity of the insurance industry to fill any gaps in coverage and prevent familial economic disasters through first-party health, life and income insurance.

These same critics contend that a failure to provide insurance compensation for injuries places a potentially unbearable economic strain on the family *unit*. This argument, however, presumes that spouses remain in economic *unity*, or at least mutuality. Under either interpretation, it would appear that society has indeed changed very little.

We should not allow ourselves to presume that every aspect of the so-called "social experiment" of the last two or three decades will endure into the future.[1] As a people, Americans are getting back to the basics. The family is the basic social unit; and a husband and a wife are the beginnings of a family. As long as that is the case, we should find some means other than interspousal litigation to compensate husbands and wives for their injuries.

CELEBREZZE, *C.J.*, concurs in the foregoing concurring opinion.

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1. Note that most of the cases abolishing the doctrine of interspousal immunity were decided within the last 20 years.

WILLIAM B. BROWN, J., *dissenting*. The majority's decision in this case today should come as a great surprise and be of great concern to the people of Ohio, especially to the female contingent. In upholding the doctrine of interspousal immunity, the majority seemingly gives credence to the theory upon which this doctrine was established, namely that a husband and wife are one. (See, generally, 1 Blackstone's Commentaries 442 [1765].) This unity principle is a legal fiction which has long been used to preclude a wife from enjoying the same full legal rights as are afforded her husband. This principle is based on the belief that a wife is the property of her husband, and is totally subordinate to and dependent upon him. In a spirit of equality, the General Assembly passed the Married Women's Act which to a large extent put the wife on an equal legal footing with her husband. The time is long overdue that this court as well recognize the legal individuality of a wife. By abrogating interspousal immunity, this court would emancipate all spouses from the vestiges of this archaic doctrine, and preserve to all every right which they had prior to marriage. I have read the majority opinion, and because I believe it represents an archaic viewpoint based on hollow and unenlightened reasoning, I must respectfully register my strong disapproval.

I previously stated the basis for my objections to the retention of interspousal immunity in my dissent in *Varholla v. Varholla* (1978), 56 Ohio St. 2d 269, 271-275. Briefly, I found the following four major flaws in the majority's reasoning. First, the argument that abolishment of interspousal immunity is a legislative rather than a judicial task is not now nor has it ever been persuasive. The doctrine of interspousal immunity had its origins in common law, and as a judicially created doctrine, it may be judicially abolished. (*Sears v. Cincinnati* [1972], 31 Ohio St. 2d 157, 161, overruling paragraph one of the

syllabus in *Hyde v. Lakewood* [1965], 2 Ohio St. 2d 155; *Muskopf v. Corning Hospital Dist.* [1961], 55 Cal. 2d 211, 359 P. 2d 457; *Molitor v. Kaneland Community United District No. 302* [1959], 18 Ill. 2d 11, 25, 163 N.E. 2d 89.)

Next, the rationale underlying the claim that interspousal immunity prevents fraud and collusion is indeed strained. It is unlikely that "a wife's love for her husband is such that she is more likely to bring a false suit against him then a genuine one," (Prosser on Torts [4 Ed.] 863, Section 122) and a similar collusive argument was unanimously rejected by this court when it declared Ohio's guest statute unconstitutional in *Primes v. Tyler* (1975), 43 Ohio St. 2d 195. In addition, there are numerous safeguards against fraudulent claims built into the judicial system.[2]

Thirdly, the justification of interspousal immunity on the grounds that it promotes marital harmony is specious and unfounded. "To conclude that forbidding spouses to sue one another promotes domestic peace is a *non sequitur*. Marital harmony either exists or it does not. The harmonious marriage will not be hurt by allowing one spouse to benefit from the insurance coverage of the other; and the unhappy marriage will not be helped by denying legal rights to an already disgruntled spouse." *Varholla, supra*, at page 273.

Finally, in my opinion, interspousal immunity is unconstitutional and should hence be abolished. The same reasoning used by this court to declare Ohio's guest statute unconstitutional in *Primes, supra*, is also applicable to this cause.

"Given the fact that spouses denied the right to sue under the interspousal immunity doctrine are discriminated

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2. Consider, for example, trial devices such as pretrial discovery and cross-examination, as well as the deterrent effect of a perjury charge.

against in the same manner and for equally unconvincing reasons as are friends denied the right to sue under a guest statute, I submit that the doctrine of interspousal immunity violates the Equal Protection Clause of the United States Constitution.

"Interspousal immunity also creates a conclusive presumption which, like the one created by the guest statute, unconstitutionally denies due process.

" '* * * [P]ermanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments,' " especially when they are " 'not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination.' *Vlandis v. Kline* (1973), 412 U.S. 441, 446 and 452." *Id.*, at page 275.

I continue to adhere to and advocate these positions, and, at this time, I would like to reemphasize and add a few points.

The majority opinion in this case stresses that the retention of interspousal immunity will preserve marital harmony. Yet, from a realistic and practical point of view, it is difficult to see just how interspousal immunity is effective in fostering and reinforcing domestic tranquility. In recent years, the cost of medical treatment and hospital bills for an injured survivor of a negligent act has increased greatly. This factor, coupled with the probable loss of income and services if the injury to the spouse is serious, will likely cause financial strains which are beyond the capabilities of the average family. These financial burdens can be equally if not more troubling than the instigation of a lawsuit for negligence. In light of the fact that financial hardship is a major factor in divorce,[3]

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3. See Cutright, Income and Family Events: Marital Stability, 33 J. Marr. & Fam. 291 (1971).

denying any recovery whatsoever to a spouse who has perhaps been crippled for life due to the negligence of his or her mate, especially where recovery can be had from an insurance company, is more likely to jeopardize a marriage rather than to safeguard it.

In Ohio, both statutory and case law permit spouses to sue each other. Ohio's Married Women's Property Act[4] allows suits between spouses in contracts and personal property claims. Moreover, in *Damm v. Elyria Lodge No. 465* (1952), 158 Ohio St. 107, this court permitted a wife of a deceased member of a voluntary association to maintain an action in tort against the association for a tort committed against her during her husband's lifetime. Interspousal immunity has also been abrogated for intentional misconduct. *Kobe v. Kobe* (1978), 61 Ohio App. 2d 67. It is inconceivable that an action for personal injury would disrupt a marriage to any greater degree than would an action for conversion or in contract.

Furthermore, upholding the doctrine of interspousal immunity on the basis of the possibility of fraud and collusion belies the centuries-old trust in our jury system. I, for one, am confident that our judicial system is well equipped to sift out fraudulent claims.

Likewise, the insurance industry is competent to deal with collusive claims. To believe that there is something called a "disadvantaged" insurance company is a far bigger myth than has ever been perpetrated under the doctrine of *stare decisis*.[5] In my 45 years as a lawyer and judge,

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4. R. C. 2307.09 *et seq.*

5. The abrogation of interspousal immunity will not leave insurance companies without recourse. Insurance companies can either exempt spouses from coverage (see Casey, The Trend of Interspousal and Parental Immunity - Cakewalk Liability, 45 Ins. Counsel J. 321 (1978), or raise the premiums for such coverage.

I have noticed that insurance companies have the best lawyers, the best investigators and the best referral systems. There is little doubt that insurance companies are more than able to protect themselves against fraudulent claims.

I agree with the assessment of the court in *Immer v. Risko* (1970), 56 N.J. 482, 495, 267 A. 2d 481, that "[i]n a day when automobile accidents are unfortunately becoming so frequent and injuries suffered by passengers are often so severe, it seems unjust to deny the claims of many because of the potentiality for fraud by the few." Indeed, such a potentiality did not restrain this court from unanimously holding the guest statute unconstitutional. See *Primes v. Tyler, supra.* Nor did it stop this court from abrogating parental immunity. See *Signs v. Signs* (1952), 156 Ohio St. 565. And this unreasonable and minimal fear should not now deter this court from abolishing interspousal immunity.

Finally, the doctrine of interspousal immunity runs afoul of the goal of tort law. The major goal of tort law is to compensate the victim rather than to punish the tortfeasor.[6] Marital status should not, and cannot, be determinative of the remedy available to redress an injury.

This court's persistence in preserving interspousal immunity is not shared by other jurisdictions. Courts are continuing to abandon the rule of interspousal immunity with dispatch, and it remains operative only in a minority of jurisdictions.[7] By virtue of this decision of this court

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6. Prosser on Torts (4 Ed.), page 6.

7. The following states have abolished interspousal tort immunity in negligence actions similar to the instant action. This list has expanded even since the Court of Appeals' decision herein, and now totals 31 states, as follows:

(Continued on following page)

Footnote continued—

Alabama: *Penton v. Penton* (1931), 223 Ala. 282, 135 So. 481; Alaska: *Cramer v. Cramer* (Alaska 1963), 379 P. 2d 95; Arkansas: *Leach v. Leach* (1957), 227 Ark. 599, 300 S.W. 2d 15; California: *Klein v. Klein* (1962), 58 Cal. 2d 692, 376 P. 2d 70, 26 Cal. Rptr. 102; Colorado: *Rains v. Rains* (1935), 97 Colo. 19, 46 P. 2d 740; Connecticut: *Bushnell v. Bushnell* (1925), 103 Conn. 583, 131 A. 432; Idaho: *Lorang v. Hays* (1949), 69 Idaho 440, 209 P. 2d 733; Indiana: *Brooks v. Robinson* (1972), 259 Ind. 16, 284 N.E. 2d 794; Iowa: *Shook v. Crabb* (Iowa 1979), 281 N.W. 2d 616; Kentucky: *Brown v. Gosser* (Ky. 1953), 262 S.W. 2d 480; Maine: *MacDonald v. MacDonald* (Me. 1980), 412 A. 2d 71; Massachusetts: *Lewis v. Lewis* (1976), 370 Mass. 619, 351 N.E. 2d 526; Michigan: *Hosko v. Hosko* (1971), 385 Mich. 39, 187 N.W. 2d 236; Minnesota: *Beaudette v. Frana* (1969), 285 Minn. 366, 173 N.W. 2d 416; Nebraska: *Imig v. March* (1979), 203 Neb. 537, 279 N.W. 2d 382; Nevada: *Rupert v. Stienne* (1974), 90 Nev. 397, 528 P. 2d 1013; New Hampshire: *Morin v. Letourneau* (1959), 102 N.H. 309, 156 A. 2d 131; New Jersey: *Immer v. Risko* (1970), 56 N.J. 482, 267 A. 2d 481; New Mexico: *Maestas v. Overton* (1975), 87 N.M. 213, 531 P. 2d 947; New York: N. Y. Gen. Oblig. Law (McKinney 1978), Section 3-313; North Carolina: *Roberts v. Roberts* (1923), 185 N.C. 566, 118 S.E. 9; North Dakota: *Fitzmaurice v. Fitzmaurice* (1932), 62 N.D. 191, 242 N.W. 526; Oklahoma: *Courtney v. Courtney* (1938), 184 Okla. 395, 87 P. 2d 660; Rhode Island: *Digby v. Digby* (R.I. 1978), 388 A. 2d 1; South Carolina: *Pardue v. Pardue* (1932), 167 S.C. 129, 166 S.E. 101; South Dakota: *Scotvold v. Scotvold* (1941), 68 S.D. 53, 298 N.W. 266; Vermont: *Richard v. Richard* (1973), 131 Vt. 98, 300 A. 2d 637; Virginia: *Surratt v. Thompson* (1971), 212 Va. 191, 183 S.E. 2d 200; Washington: *Freehe v. Freehe* (1972), 81 Wash. 2d 183, 500 P. 2d 771; West Virginia: *Coffindaffer v. Coffindaffer* (W. Va. 1978), 244 S.E. 2d 338; Wisconsin: *Wait v. Pierce* (1926), 191 Wis. 202, 209 N.W. 475.

There is a long list of well-recognized scholars and commentators who have urged legal equality for spouses for years. The list includes the following:

Prosser on Torts (4 Ed.), Section 122; 1 Harper & James, The Law of Torts, Section 8.10 (1956); Notes, 28 Clev. St. L. Rev. 115 (1979); Comments, The Impact of Abrogation of Interspousal Immunity in Nebraska, 13 Creighton L. Rev. 423 (1979); Case Notes, Domestic Relations—Abrogation of Interspousal Immunity —An Analytical Approach, 19 De Paul L. Rev. 590 (1970); Recent Decisions, 13 Duq. Univ. L. Rev. 156 (1974); Greenstone, Abolition of Intrafamilial Immunity, 7 The Forum 82 (1972); McCurdy, Torts Between Persons in Domestic Relation, 43 Harv. L. Rev. 1030 (1930); Notes, Litigation Between Husband and Wife, 79 Harv. L. Rev. 1650 (1966); Comments, 36 Mont. L. Rev. 251 (1975); Comments, 12 New Eng. L. Rev. 333 (1976); Recent Dev., 27 Ohio St. L.J. 550 (1966), 40 Ohio St. L.J. 771 (1979); Comments, 3 Rut.-Cam. L.J. 183 (1971); Case Comments, 11 Suffolk U.L. Rev. 1214 (1977); Comment, 47 Tennessee L. Rev. 123 (1979).

today, Ohio's law will continue to march in a lockstep toward the judicial philosophy of the Victorian era.

The majority opinion rationalizes this backward march on the basis of *stare decisis*.[8] "As to the fundamental nature and the importance of *stare decisis*, there is no doubt. It lies at the heart of the common law. By this rule, our society has preserved the best of the wisdom and the morality of past ages. Wisdom and morality, however, are not immutable universals of the scholastic philosophers; they are to be modified by each new generation.

"When, however, a rule of law is judge-made, and the reasons for its use have vanished, the court should not perpetuate it until petrification. A rule that has outlived its usefulness should be changed. Such an approach to *stare decisis* was urged by Justice Cardozo in his outstanding book, The Nature of the Judicial Process, pp. 150-152:

" 'But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law. Perhaps we should do so oftener in fields of private law where considerations of social utility are not so aggressive and insistent. There should be greater readiness to abandon an untenable position when the rule to be discarded may

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8. While the majority purports that it is bound by *stare decisis* to uphold the doctrine of interspousal immunity, it is interesting to note that it was not until 1965 in *Lyons v. Lyons*, 2 Ohio St. 2d 243, that this court first explicitly recognized interspousal immunity. See, generally, Sullivan, Intra-Family Immunity and the Law of Torts in Ohio, 18 W. Res. L. Rev. 447 (1967).

not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years. In such circumstances, the words of Wheeler, J., in *Dwy v. Connecticut Co.*, 89 Conn. 74, 99 (92 A. 883, L.R.A. 1915E, 800, Ann. Cas. 1918D, 270), express the tone and temper in which problems should be met:

"'"That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and it should not be stationary. Change of this character should not be left to the Legislature."'" *Thacker v. Bd. of Trustees of Ohio State Univ.* (1973), 35 Ohio St. 2d 49, 70-71 (William B. Brown, J., dissenting.[9]

The doctrine of *stare decisis* must not be so narrowly pursued that the body of common law is forever encased in a straightjacket. As was stated in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* (1976), 46 Ohio St. 2d 105, 119, fn. 8, "[t]his court is more accustomed to detecting and correcting the errors of others than its own. It is to be hoped that we will always remain willing to correct them whether found in either place." It is unfortunate that this court has unblinkingly kept its gaze to the past, has

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9. Indeed this court found no need to defer to the General Assembly, for example, when it abrogated charitable hospital immunity in *Avellone v. St. John's Hospital* (1956), 165 Ohio St. 467 or governmental immunity for municipality-owned hospitals in *Sears v. Cincinnati* (1972), 31 Ohio St. 2d 157.

failed to see the error in its way and has declined to give the doctrine of interspousal immunity the quick burial it so rightfully deserves.

SWEENEY and C. BROWN, *JJ.*, concur in the foregoing dissenting opinion.

CLIFFORD F. BROWN, *J.*, dissenting. For the reasons so perspicaciously expressed by Justice William B. Brown in his dissent in *Varholla v. Varholla* (1978), 56 Ohio St. 2d 269, at pages 271-275; in support of the abolition of the interspousal immunity rule in negligence actions, I dissent.

As in *Varholla*, this court again asserts the same outmoded reasoning for the preservation of interspousal immunity, namely, (1) promotion of marital harmony; (2) prevention of fraud and collusion "'at the expense of tactically disadvantaged insurance companies,'" and (3) the belief that any change in interspousal immunity must emanate from the General Assembly. These reasons are created by a judiciary out of touch with the realities of modern life. Each has been thoroughly analyzed and demolished in the *Varholla* dissent.

The right of the wife to bring other legal actions against her husband reveals the hypocrisy of the claimed advancement of marital harmony through interspousal immunity in negligence actions. There is no sound reason to permit a wife to sue her husband for money loaned, see *Hart v. Sarvis* (1894), 3 N.P. 316, or for damages for injuries intentionally inflicted, see *Kobe v. Kobe* (1978), 61 Ohio App. 2d 67, and to deny the same spouse her right to maintain a tort action against her husband for his negligence, especially when he procured insurance to protect himself for that very purpose. If marital harmony is the purpose of the immunity rule then the wife should have no right to bring *any* legal action against her husband.

Domestic harmony and tranquility will not be disrupted to any greater degree by a damage action of the

wife against her husband for negligently causing her injury than it would by civil action in ejectment, partition, contract or intentional tort. *Klein v. Klein* (1962), 58 Cal. 2d 692, 376 P. 2d 70; *Shook v. Crabb* (Iowa 1979), 281 N.W. 2d 616; *Coffindaffer v. Coffindaffer* (W. Va. 1978), 244 S.E. 2d 338; *Freehe v. Freehe* (1972), 81 Wash. 2d 183, 500 P. 2d 771; *Rupert v. Steinne* (1974), 90 Nev. 397, 528 P. 2d 1013; *Immer v. Risko* (1970), 56 N.J. 482, 267 A. 2d 481. On the contrary, the denial of a just remedy to the injured spouse against her husband in a negligence action will adversely affect marital harmony.[10]

The second reason for interspousal immunity advanced in the *Varholla* case, *i.e.*, to prevent fraud and collusion " 'at the expense of *tactically disadvantaged insurance companies.*' " borders on the absurd.[11] The investigative tools and skilled legal counsel available to insurance companies, along with discovery and trial procedures designed to eliminate surprise and reveal all the facts (*e.g.* Civ. R. 26 through 37, 56), will easily meet the challenge of spurious or fraudulent claims. These same factors negate any claim that insurance companies are "tactically disadvantaged." To conclude otherwise evinces a facility to remain unaware of the abilities of our judges and jurors and the realities of our adversary system. *MacDonald v.*

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10. The marital harmony contention evaporates when one considers the list of 31 judicially progressive states which have abolished interspousal immunity in negligence actions. See dissenting opinion of Justice William B. Brown, supra, at fn. 7.

11. The fraud and collusion reason presupposes that spouses are dishonest when the injured spouse claims compensation from the negligent spouse and his insurer. Yet, if in a later accident the same negligent spouse injures his sister, that sister is not barred by any immunity rule from recovering damages from him. If fraud and collusion is not urged to bar recovery by a sister, it follows that sisters are more honest and therefore less likely to perpetrate fraud than wives. This assumption brings to mind a quote from Charles Dickens: " 'If the law supposes *that*,' said Mr. Bumble, 'the law is a ass, a idiot." *Oliver Twist*, Chapter 51. These words may well be wiser than all of the legal precedent cited in support of the interspousal immunity rule.

MacDonald (Me. 1980), 412 A. 2d 71; *Merenoff v. Merenoff* (1978), 76 N.J. 535, 388 A. 2d 951; *Beaudette v. Frana* (1969), 285 Minn. 366, 173 N.W. 2d 416; *Brown v. Gosser* (Ky. 1953), 262 S.W. 2d 480; *Immer v. Risko, supra; Coffindaffer v. Coffindaffer, supra.*

The third reason advanced for interspousal immunity, that the change abolishing it must be made by the General Assembly, is an abdication of the judicial function and completely without merit. Since the courts created the interspousal immunity doctrine, the courts can abolish it. *Varholla, supra,* at page 272, citing therein *Sears v. Cincinnati* (1972), 31 Ohio St. 2d 157. See, also, *Lewis v. Lewis* (1976), 370 Mass. 619, 351 N.E. 2d 526; *Burns v. Burns* (1974), 21 Ariz. App. 337, 519 P. 2d 190; *Shook v. Crabb, supra.*[12]

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12. The apt words of the concurring judges of the Court of Appeals in this case concerning suggested changes in the interspousal immunity doctrine should be heeded. Judge Day incisively stated:

"Were there no writing on the slate I would not follow a spousal immunity policy which seems to me medieval, particularly in an insured case.

"* * *

"Accordingly, my concurrence is reluctant. The principles announced in Justice William Brown's dissent seem to me to represent the logical, and incidentally, majority view in the country. * * *"

Judge Patton pointedly and succinctly stated:

"* * * I have examined the reasoning set forth by the Ohio Supreme Court in *Varholla v. Varholla* (1978), 56 Ohio St. 2d 269, and I find it most difficult to rationalize the overturning of the 'guest statute' and the preservation of the interspousal immunity doctrine.

"* * *

"* * * The original purposes for the doctrine were laudable but they have become archaic in light of the sophisticated ability of insurance companies, the refinement of court room evidentiary processes, and the social patterns of society."

We should also heed our own advice concerning *stare decisis* as set forth in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* (1976), 46 Ohio St. 2d 105 at page 119, fn. 8, where we stated:

(Continued on following page)

I see no reason to preserve interspousal immunity, based on any statement such as, "Having recently considered these policies in *Varholla* and since nothing of import affecting that holding has subsequently taken place—other than the relatively short passage of time—we shall adhere to our previously announced position."[13] On the contrary, as I pointed out in my concurring opinion in *Shroades v. Rental Homes* (1981), 68 Ohio St. 2d 20, at page 28: "Stare decisis does not mean that a decision of this court cannot be modified or overruled in the near or distant future 'where no additional relevant factors are presented which would alter our prior pronouncement on the subject.' "

Stare decisis should never be used as an excuse to avoid overruling a judicial precedent only a few days or weeks old if the interests of justice require it. Indeed, justice is the only purpose for which courts exist.

Varholla, supra and *Lyons v. Lyons* (1965), 2 Ohio St. 2d 243, never served the purpose of justice. They should never have been the law and they deserve to be overruled at the earliest possible moment.

W. BROWN and SWEENEY, *JJ.*, concur in the foregoing dissenting opinion.

Footnote continued—

"This opinion has been a lengthy one. Its intent was to make fully clear why this court today overrules an opinion rendered without dissent only a year ago. This court is more accustomed to detecting and correcting the errors of other than its own. It is to be hoped that we will always remain willing to correct them whether found in either place"

13. The decision today retaining interspousal immunity because this court reiterated it in 1978 in *Varholla* is maintaining the status quo to the point of sheer nonsense. Such rationale will only continue to make Ohio the source of laughter in the area of tort law among law students and legal commentators in other jurisdictions. See *Shroades v. Rental Homes* (1981), 68 Ohio St. 2d 20, concurring opinion at pages 27-29, and *Leichtamer v. American Motors Corp.* (1981), 67 Ohio St. 2d 456, concurring opinion at pages 476-477.

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO

(Dated December 31, 1980)

NO. 42208

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

HANNA BONKOWSKY,
Plaintiff-Appellant,

vs.

OTTO BONKOWSKY,
Defendant-Appellee.

JOURNAL ENTRY AND OPINION

PRYATEL, *P.J.*

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Appellant Hanna Bonkowsky was a passenger in an automobile driven by her husband, appellee Otto Bonkowsky, when their car collided with another vehicle. The accident occurred in Vermont. The couple was married at the time of the accident and remains so today. The two have at all times remained Ohio residents.

Hanna filed suit in the Common Pleas Court seeking damages for her injuries sustained as a result of her husband's alleged negligence in causing the car accident. The

parties stipulated that Otto's insurance policy did not expressly bar the claim filed by his spouse.

Otto filed a motion for summary judgment. He contended that Ohio's adherence to the doctrine of interspousal immunity barred Hanna's claim, notwithstanding the fact that the law of Vermont, the *lex loci delicti*, allowed such cause of action.

Hanna filed a motion in opposition, contending that Ohio remains among a shrinking minority of states still clinging to an archaic legal fiction. She argued that the policy underlying the common law doctrine of interspousal immunity is void of any rational basis and that she should not be precluded from obtaining redress for her injuries by reason of such an outdated concept.

The trial court granted Otto's motion for summary judgment.

Hanna presents three assignments of error. We will discuss them together, since they entail a common issue.

I. THE TRIAL *COURT* COMMITTED REVERSIBLE ERROR BY GRANTING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO STRIKE DOWN AS UNCONSTITUTIONAL THE DOCTRINE OF INTERSPOUSAL IMMUNITY.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO APPLY THE SUBSTANTIVE LAW OF THE STATE OF VERMONT - "THE LEX LOCI DELICTI" - EVEN IF THE FALLACIOUS DOCTRINE OF INTERSPOUSAL IMMUNITY IS PERPETUATED IN OHIO UNDER THE CIRCUMSTANCES OF THIS CASE.

The Supreme Court of Ohio has consistently upheld the application of interspousal immunity to bar an action in which one spouse seeks to obtain redress for the other spouse's negligence. *Varholla v. Varholla* (1978), 56 Ohio St. 2d 269; *Lyons v. Lyons* (1965), 2 Ohio St. 2d 243.

That court has held the doctrine to be constitutional. *Varholla v. Varholla, supra.*

Traditionally, conflicts between state laws governing torts have been resolved through application of the laws of the state in which the injury occurred, the *lex loci delicti.* Thus, Hanna contends the law of Vermont, allowing a wife to sue her husband for the latter's negligence, should be applied to the instant case.

However, this general principle of conflicts in tort law has been abandoned in favor of a more modern, flexible approach in resolving disputes, reflecting the increased mobility of today's society.

The trend today is to look to the laws of the state having the most significant relationship to the parties involved, the state having the dominant interest in the resolution of the parties' dispute. *See, e.g., Conklin v. Horner,* 38 Wis. 2d 468, 157 N.W. 2d 579 (1968); *Babcock v. Jackson,* 12 N.Y. 2d 473, 191 N.W. 2d 279 (1963).

This view is reflected in the Second Restatement of the Conflicts of Laws, whereby a court, faced with choosing the *lex loci delicti* or the *lex fori,* is directed to consider the rights and liabilities of the parties to be governed by the laws of the state "with the most significant relationship to the parties." Restatement (Second) of Conflict of Laws, §§ 6, 145, 154.

Accordingly, Ohio has rejected the "rote application of lex loci delecti" where considerations of public policy should accompany the judicial resolution of conflicts be-

tween the laws of other states. *Moats v. Metropolitan Bank of Lima* (1974), 49 Ohio St. 2d 47, 49; *Fox v. Morrison Motor Freight* (1971), 25 Ohio St. 2d 193, 195.

Ohio's public policy expressly prohibits the maintenance of a negligence action between spouses. *Varholla, supra; Lyons, supra.* In the instant case, both parties have remained married, Ohio residents. The situs of the couple's automobile accident was merely adventitious, having little or no bearing upon Ohio's paramount, continuing interest over their marriage relationship. We find that the policy of the state of Ohio takes precedence over that of the state of Vermont under the circumstances of this case. *Cf.*, Restatement (Second) of Conflict of Laws, §6.

Ohio law clearly precludes Hanna's recovery against her husband for his alleged negligence.

Accordingly, we overrule her assignments of error and affirm the judgment of the trial court.

It is ordered that appellee recover of appellant his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ AUGUST PRYATEL
Presiding Judge

PATTON, J., Concurs
(See Concurring Opinion attached)

DAY, J., Concurs
(See Concurring Opinion attached)

CONCURRING OPINION

DAY, *J.*, Concurring:

I concur in the judgment but add a few words of explanation.

Precedent is not a corset. And because a court was wrong yesterday does not mean that it must persist in the error tomorrow. However, precedent, especially recent precedent, must be observed by inferior courts to enable orderly administration of justice.

Were there no writing on the slate I would not follow a spousal immunity policy which seems to me medieval, particularly in an insured case.

However, two years ago *Varholla v. Varholla* (1978), 56 Ohio St. 2d 269, was decided. It is foursquare against appellant's contentions in this case except for the possibility that there was no insurance in *Varholla*.[1] That is a distinction that may make a difference in the Supreme Court of Ohio.

Accordingly, my concurrence is reluctant. The principles announced in Justice William Brown's dissent seem to me to represent the logical, and incidentally, majority view in the country.

CONCURRING OPINION

PATTON, *J.*, Concurring:

I concur in the judgment; however, I feel compelled to comment on the doctrine upon which this judgment is premised. I have examined the reasoning set forth by the Ohio Supreme Court in *Varholla v. Varholla* (1978),

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1. The case report does not make it clear whether there was insurance.

56 Ohio St. 2d 269, and I find it most difficult to rationalize the overturning of the "guest statute" and the preservation of the interspousal immunity doctrine.

The reasons given for the acceptance of the doctrine of interspousal immunity are essentially the same as those that were argued for the preservation of the "guest statute". They are threefold:

> (1) [I]mmunity promotes marital harmony by discouraging otherwise litigious spouses from pursuing real or fanciful claims to the detriment of the family unit; (2) the immunity prevents fraud and collusion at the expense of tactically disadvantaged insurance companies; and (3) as this involves a matter of public policy, changes in this area must emanate from the General Assembly, not the courts.

Varholla, supra at 270.

The court instituted doctrine of interspousal immunity creates an arbitrary disability preventing spouses from suing one another for injuries caused by each other's negligence. The purpose of the doctrine as rationalized by the Ohio Supreme Court is to promote the two propositions previously stated. However, a realistic review of these theories demonstrates the hollowness of their further use as premises for this doctrine. The original purposes for the doctrine were laudable but they have become archaic in light of the sophisticated ability of insurance companies, the refinement of courtroom evidentiary processes, and the social patterns of society.

The honorable goal of preventing fraudulent and collusive suits by spouses has been minimized by the increased economic and legal investigative resources of insurance companies. The litigation involved in a claim by a spouse against a spouse involves advanced medical

evidence of injuries that must be proven to the trier of fact. The days have long passed where the evidence relied upon by the trier of fact comes solely from the parties involved. Today, we have expert medical evidence to verify the extent of injury to the party.

The costs of medical treatment to the injured survivor of a negligent act caused by another's spouse has greatly increased. Hence, the need for the apportioning of medical costs to the overall society has become necessary. Insurance has filled the need of the shared injury costs in society. The operation of interspousal immunity frequently operates to restrict this social policy.

The state's interest in promoting marital harmony and preservation of the family unit is at all times to be a paramount concern of the state. However, there is little evidence that the doctrine of interspousal immunity reinforces the marital harmony of the population of the state. The strains of an accident which causes injuries that are beyond the financial capabilities of a family can be equally if not more troubling than the instigation of a lawsuit.

To argue that an individual is more likely to bring a collusive suit with his spouse than with a guest in a vehicle does not bear up under a pragmatic review. Nor does it give much credit to the deterrent of a perjury charge and judicial devices established in our system to seek the truth. This premise assumes irregularity rather than the honesty upon which our system is based. As pointed out by Justice William B. Brown in his dissent in *Varholla, supra* at 272, the Ohio Supreme Court has already rejected the presumption of irregularity in *Primes v. Taylor* (1975), 43 Ohio St. 2d 195. This is not to say a collusive suit is not possible but it does suggest that it is a minimal danger to our judicial system. It is a threat

that clearly does not justify the all-inclusive nature of a prohibition of all suits by spouses against one another for their negligent acts.

In contrasting the Ohio Supreme Court's reasoning in *Varholla, supra,* and *Primes, supra,* I cannot find a justifiable distinction allowing the overturning of the "guest statute" and the continuation of the interspousal immunity statute. The conclusive presumptions used to justify the shield of liability of one spouse from the other spouse are no longer viable and do not dictate the continuation of differential treatment afforded by interspousal immunity. As was pointed out in *Varholla, supra,* since 1965, we have gone from a "shrinking majority" of American jurisdiction that embraced the interspousal immunity doctrine to a "shrinking minority".

I must also concur with the position taken by Justice William Brown, that this judicially-created doctrine is readily abolishable by the court. The doctrine is inconsistent with the progressive nature of our civil law. Therefore, my concurrence is not expressed without deep misgivings and hope that the doctrine will be reconsidered by the higher court.

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Dated March 24, 1980)

Case No. 999203

IN THE COURT OF COMMON PLEAS

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

HANNA BONKOWSKY,
Plaintiff,

vs.

OTTO BONKOWSKY,
Defendant.

JUDGMENT ENTRY

Defendant's motion for summary judgment is granted (see *Moss v. Moss*, Court of Appeals No. 39876, decided December 20, 1979; *Varholla v. Varholla*, 56 Ohio St. 2d 269 (1978); *Lyons v. Lyons*, 2 Ohio St. 2d 243 (1965); *Thomas v. Harron*, 20 Ohio St. 2d 62 (1969)).

/s/ JAMES J. MCMONAGLE
Judge

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Dated February 10, 1982)

No. 81-270

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

HANNA BONKOWSKY,
Appellant,

vs.

OTTO BONKOWSKY,
Appellee.

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Dated February 10, 1982)

No. 81-270

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO
CITY OF COLUMBUS

HANNA BONKOWSKY,
Appellant,

vs.

OTTO BONKOWSKY,
Appellee.

MANDATE

To the Honorable Common Pleas Court within and for the County of Cuyahoga, Ohio, greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

Opposition

Office - Supreme Court, U.S.
FILED
JUN 1 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2092

Supreme Court of the United States

October Term, 1981

HANNA BONKOWSKY,
Petitioner,

vs.

OTTO BONKOWSKY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 81-2092

Supreme Court of the United States

October Term, 1981

HANNA BONKOWSKY,
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vs.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Plaintiff-petitioner raised a due process issue in the trial court and thereafter raised the equal protection of law issue in the Ohio Court of Appeals and Supreme Court.

ARGUMENT

I. OHIO'S DOCTRINE OF INTERSPOUSAL TORT IMMUNITY IS NOT A QUESTION FOR REVIEW BY THIS COURT UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The long established Ohio judicial doctrine of interspousal tort immunity applies equally to husbands and wives.

The cases cited by plaintiff-petitioner discuss specific fact situations wherein this court has reviewed cases involving equal protection, however, are not in point with the facts and the doctrine involved herein.

Even if it is assumed that there is the impingement of a fundamental right, the facts herein do not suggest a failure by the State of Ohio to carefully scrutinize the application of the doctrine.

The Ohio Supreme Court in *Lyons v. Lyons*, 2 Ohio St. 2d 243 (1965) stated, in referring to the Ohio Married Woman's Act, to-wit:

> "These statutes, however, do not remove all common-law immunities and disabilities as between spouses."
>
> "The public policy of this state is to promote marital harmony. . . ."
>
> "Likewise, it is the public policy of this state to prevent fraud and collusion." (Page 244)

Said court in *Varholla v. Varholla*, 56 Ohio St. 2d 269 (1978) reviewed its decision in *Lyons* and stated as follows, to-wit:

> "We think it sufficient to state that the interspousal immunity doctrine, with its inherent differential treatment of spouses and non-spouses, reasonably relates to the legitimate state interest of fostering marital harmony and preventing fraud and collusion." (Page 270)

The Ohio Supreme Court in the case at bar again reviewed and reaffirmed its previous position.

It is further noted that the interspousal immunity doctrine is not unique to Ohio; that although it has been abrogated in a number of states (31 according to a dissenting opinion in *Bonkowsky* (Appendix Page 16)), Ohio, after due consideration, has continued to consider that the public interest exceeds the individual rights of plaintiff-petitioner.

This court in *Weinberger v. Salfi*, 422 U.S. 749 (1975) reversed a lower court decision which had invalidated an irrebuttable presumption based on a duration-of-relationship Social Security eligibility requirement for surviving wives and stepchildren of deceased wage earners. The court stated, to-wit:

> "The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. We conclude that the duration-of-

relationship test meets this constitutional standard." (Page 777)

The court had previously noted that:

". . . a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" (Page 769 citing *Dandridge v. Williams*, 397 U.S. 471 (1970))

There are no new and previously undecided issues suggested herein for review by this court.

II. OHIO'S DOCTRINE OF INTERSPOUSAL TORT IMMUNITY IS NOT A QUESTION FOR REVIEW BY THIS COURT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Plaintiff-petitioner has not relied upon due process in the appellate courts below.

Furthermore, the issues raised have been announced by this court in *Weinberger v. Salfi, supra.*

There are therefore no new issues to be reviewed.

CONCLUSION

There are no issues presented by plaintiff-petitioner raising important questions of Federal law which have not been settled by this court as provided in Rule 17.1(C) of the rules of this court and the Ohio Supreme Court has clearly carefully considered the issues and has sustained its position on interspousal immunity based on public policy considerations. Accordingly, the petition should be denied.

Respectfully submitted,

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